Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of ALLIANCE CONTACT SERVICES, ET. AL. Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing	)	CG Docket No. 02-278 DA 05-1346

COMMENTS OF VENETIAN CASINO RESORT, LLC

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INTRODUCTION

The Venetian Casino Resort, LLC ("The Venetian") submits these comments in support of the Petition for Declaratory Ruling ("Joint Petition") filed with the Commission on April 29, 2005 by thirty-two companies, charities and trade associations. The Joint Petition requests the Commission to rule that (a) it has exclusive regulatory jurisdiction over interstate telemarketing, (b) states have no authority to regulate such activities; and (c) state telemarketing laws apply only to intrastate calling, and do not apply to interstate calling.

The Venetian is a world class luxury resort, casino and convention center headquartered in Las Vegas, Nevada. It features The Grand Canal Shoppes, the Canyon Ranch SpaClub, an expansive casino, 17 fine dining restaurants, the Guggenheim-Hermitage museum, and extensive convention and corporate services. The Venetian is a recipient of the Exxon/Mobile Four Star Award, AAA's Four Diamond Award, and the Five Star-Diamond Award by the American Academy of Hospitality Sciences. Additionally, the resort has been honored as one of the top 100 hotels in North America by Travel & Leisure Magazine, and has been noted as one of the top five catering departments in the world by Meetings and Conventions Magazine.

The Venetian utilizes a variety of direct and indirect marketing methods to continuously attract guests to the resort. The former typically involve the initiation of targeted telephone and direct mail solicitations to guests who previously stayed with us.

The Venetian's compliance team spends a significant amount of time, energy, efforts and money on ensuring The Venetian's compliance with all state and federal telemarketing restrictions. The team is comprised of in-house compliance and quality assurance personnel. Additionally, the Venetian utilizes in-house and outside legal counsel to provide compliance-related direction, instruction, guidance and policies to the Venetian's compliance team.

The compliance team expends a significant amount of effort and resources to ensure that the company's marketing programs are within the regulatory framework of those states which have heeded the Commission's direction by implementing restrictions on interstate telemarketing which are consistent with, and not more restrictive than, the Commission Rules. The team is forced to expend even more resources on navigating the Venetian through the minefield created by states, which have unambiguously ignored the Commission's request not to implement rules and regulations affecting interstate telemarketing which are more restrictive than the Commission Rules. These states' attempts to implement and enforce a myriad of more restrictive regulations on interstate telephone calls impede the Venetian's effort to contact its previous and prospective guests and significantly increase its compliance costs. The Venetian contends, as do the joint petitioners, that the states' implementation of restrictions on interstate telemarketing calls needless increase The Venetian's costs, as states do not have jurisdiction to regulate interstate telemarketing in the first place.

SUMMARY

Telemarketing is a legitimate and valuable direct marketing channel. Congress recognized this when it enacted the Telephone Consumer Protection Act of 1991, making it clear that telemarketing

regulation is to be both balanced and uniform. State regulation of interstate telemarketing is totally incompatible with the goals of Congress.

Moreover, states have neither jurisdiction nor regulatory authority over interstate telephone communications in general, or interstate telemarketing calls in particular. This principle is – or at least should be – beyond dispute, but the states refuse to accept or abide by it.

Unless the Commission clarifies and reaffirms its exclusive jurisdiction over interstate telemarketing, states will continue to impose improper and unfair burdens and risks on companies engaged in those activities. In addition, the states will extend their unauthorized regulatory reach to other kinds of interstate and foreign calls.

ARGUMENT

I. State Regulation Of Interstate Telemarketing Defeats The Goals of Balance And Uniformity That Congress Identified When it Enacted The TCPA

When Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA)[1] it made clear that telemarketing is a legitimate and valuable marketing channel. Indeed, the TCPA, and the regulations issued pursuant thereto,[2] are replete with clear statements of the findings and principles that Congress determined should guide telemarketing regulation:

- Telemarketing serves a valuable role in the economy;
- Legitimate telemarketers have economic and commercial speech interests that are to be recognized; and
- Telemarketing regulation must reflect a careful balancing of the rights of legitimate telemarketers with the privacy rights of consumers.[3]

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[1] 47 U.S.C. § 227.

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 (1992). Cited herein as "1992 Report and Order, 7 FCC Rcd. ___."

[3] "Individuals' privacy rights, public safety interests and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices" TCPA, §2(9).

* * *

"Our task in this proceeding is to implement the TCPA in a way that reasonably accommodates individuals' rights to privacy as well as the legitimate business interests of telemarketers." 1992 Report & Order, 7 FCC Rcd at 8754.

Central to the "balancing of rights" approach adopted by Congress is that regulation of interstate telemarketing calls is to be uniform nationwide. The Commission itself recognized this regulatory principle in 2003, stating that

> " . . . it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for the telemarketers and potential consumer confusion." [4] 2003 Report and Order, ¶ 83 (emphasis supplied)

It is impossible to overstate how completely the current maze of state telemarketing laws frustrates the federal objective of a "uniform regulatory scheme" for interstate telemarketing calls, a scheme that was deemed necessary for the precise reason that, as Congress clearly recognized, states have no jurisdiction over interstate calls (see Section II, *infra*).

Despite their lack of authority to do so, states have enacted a host of telemarketing laws and regulations ("state rules") that make no distinction between intrastate and interstate calls and, consequently, purport to apply to both.[5] These state rules cover the same subjects as the federal rules, but their specific provisions vary considerably from state to state, and many are inconsistent with the federal rules, thus presenting telemarketers with precisely the "substantial compliance burden" Congress and the Commission sought to avoid (2003 Report and Order, ¶ 83). The Joint Petition contains

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"The rules we adopt attempt to balance the privacy concerns which the TCPA seeks to protect, and the continued viability of beneficial and useful business services." Ibid.

"Both Congress and the Commission have found telemarketing serves a valuable role in our economy . . . " Id at 8782.

"Our objective in this proceeding has been to hold telemarketers accountable for their activities without undermining the legitimate business efforts of telemarketing." Ibid.

"In crafting these provisions, I was mindful of the need to strike a reasonable balance between privacy rights, public safety interests, and commercial freedoms of speech and trade, which Congress cited as a primary concern in enacting the 1991 Act." (Statement of Commissioner Andrew C. Barrett) Id. at 8794.

[4] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014 (2003). Cited herein as "2003 Report and Order, ¶ ___."

[5] Review of state telemarketing laws and regulations has failed to uncover a single instance where a distinction is made between intrastate and interstate calling, despite the clear provisions of the 1934 Communications Act and the TCPA (see pp. 5-6, infra).

excellent analyses of various areas where current state rules are inconsistent with the federal rules (and, frequently, with each other), and further extensive discussion is not warranted. However, three particularly egregious examples warrant special comment.

State Do Not Call Lists

Prior to establishment of the national do-not-call (NDNC) registry, there was considerable discussion of the need for "harmonization" between the national list and the 28 state DNC lists then in existence. At a Congressional hearing in January 2003, then-Chairman Muris of the FTC declared:

> ". . . the Commission believes it likely that, over the next twelve to eighteen months, the FTC and the states will harmonize their do-not-call requirements and procedures . . . Through harmonization, we believe we can eliminate costly inefficiencies to telemarketers by creating one national registry – that is, one source of information – with one fee."[6]

Suffice it to say, the "harmonization" projected by Chairman Muris has failed to materialize in the 20 months since the NDNC registry became effective, and there is little evidence that states support, or are inclined to move toward, "one national registry." As of today, no fewer than 16 states maintain separate DNC lists, which must be purchased by all telemarketers, including those making only interstate calls (see Joint Petition, Figure 6, p. 22). Moreover, it is no longer sufficient for a residential telephone subscriber to register only on his/her state's DNC list in the expectation that his/her number will be uploaded to the national DNC list. As of June 30, the FTC has stopped taking uploads from state lists, so a subscriber who registers for the state list must also register for the national list if he/she wants to be sure of being included in both.[7]

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[6] *Hearing on Do Not Call List Authorization*, H. Rep. 108-1, 108th Congress, 1st Sess. at 17 (Jan. 8, 2003).

[7] See, e.g., the web site of the Colorado Public Utilities Commission/Department of Regulatory Agencies (http://www.dora.state.co.us/puc/telecom/nocalllist.htm). This development will have no effect in Indiana, which has refused all along to upload its state list to the national list.

Established Business Relationship (EBR) Exemption

In its 2003 Report and Order, the Commission correctly recognized the significance of the EBR exemption in the national do-not-call regulations, and went to considerable length to explain the rationale for the revised EBR definition it adopted.[8] Notwithstanding the Commission's thoughtful and comprehensive approach, no fewer than thirty-three (33) states have adopted EBR provisions that differ from the federal rules, thereby creating a compliance nightmare for telemarketers and severely restricting their ability to communicate with their own customers.

- One state – Indiana – provides no EBR exemption to its state do-not-call law. As a result, out -of-state companies have no right to call their Indiana customers without obtaining prior express consent, a practical impossibility. Remarkably, however, the Indiana legislature decided to permit unsolicited calls by real estate brokers, insurance salespersons, and newspapers to both existing customers and prospects even if they are on the state DNC list.

- Twelve (12) states do not extend the EBR exemption to calls by affiliates, as provided in the federal rules, even though many companies – for entirely legal and justifiable reasons – conduct telemarketing and other activities through wholly owned subsidiaries.

- While the federal rules permit the sending of pre-recorded messages under the EBR exemption, four (4) states strictly prohibit such messages, five (5) other states require that sellers obtain a customer's prior express consent before sending such messages, and seventeen (17) other states have various requirements (e.g. registration; disclosures; disconnection; calling hours) that exceed federal requirements. Moreover, even in some states that allow pre-recorded messages under the EBR exemption, the exemption itself is narrower than the federal EBR exemption.

- Nine (9) states limit the duration of the EBR exemption to periods shorter than the 18months provided in the federal rules. As a result, companies must modify and constantly monitor their customer calling programs, which are generally not structured on a state-by-state basis, to ensure compliance with state-by-state requirements.

- The terms "Established Business Relationship"; "Existing Business Relationship"; "Pre-existing Business Relationship"; "Prior Business Relationship"; "Existing Customer"; "Established Customer", and "Current Client" are used in various state statutes and regulations. In most cases the terms are not defined and there is no practical or effective process for obtaining clarification of their meaning. Some companies have ceased calling

[8] 2003 Report and Order, ¶ 109-127. See also the Commission's Second Order on Reconsideration, FCC 05-28 (2005), ¶ 24-27.

into certain states with particularly complex EBR provisions/definitions because of the inherent risk of being cited for inadvertent violations.

Mandatory Disclosures and Related Requirements

Among the most onerous and least justifiable of the state rules are those that dictate, state by state, what a caller must say, what a caller must not say, and what a caller must say or do in response to a certain response by a call recipient. The requirements are well summarized in the Joint Petition (Figure 2, p. 15), but no summary can communicate adequately the practical problems, compliance burdens, and regulatory risks associated with such mandatory disclosures, which go well beyond those required by the federal rules.

* * *

In summary, state regulation of interstate telemarketing totally frustrates the goals of balance and uniformity that Congress identified when it enacted the TCPA. It is time for the Commission to take clear and definitive action to ensure that those goals are achieved. The Commission can do so simply by reaffirming the exclusive jurisdiction over interstate telecommunications in general, and interstate telemarketing in particular, that Congress conferred upon it in the Communications Act and the TCPA.

II. The FCC's Exclusive Jurisdiction Over Interstate Telemarketing Is Clear, But Needs to Be Reaffirmed

When Congress enacted the Communications Act of 1934, it adopted a dual jurisdictional framework for the regulation of telephone communications. Section 2(a) gave the FCC exclusive jurisdiction over all *interstate* and *foreign* telecommunications, while Section 2(b) reserved to the states jurisdiction with respect to *intrastate* telecommunications. (47 U.S.C. § 152(a) and (b)). This basic division of regulatory authority – federal authority over interstate calls/state authority over intrastate

calls – has been recognized and affirmed in federal court decisions and FCC pronouncements ever since.[9]

Fifty-seven years after passage of the Communications Act, Congress enacted the TCPA, which conferred upon the FCC exclusive jurisdiction over telemarketing regulation. At the same time, Congress amended Section 2(b) of the Communications Act to give the FCC concurrent jurisdiction (with the states) over *intrastate* telemarketing calls (in addition to its continuing exclusive jurisdiction over *interstate* telemarketing calls). Notably, Congress did *not* amend Section 2(a) to give the states any jurisdiction over interstate telemarketing calls, and the legislative history of the TCPA makes clear Congress' recognition that states have no jurisdiction over interstate telephone calls.[10]

The Need for the FCC to Reaffirm Its Jurisdiction

Unfortunately, states have refused to accept the FCC's clearly established exclusive jurisdiction over interstate telemarketing. They continue to enact and propose laws that purport to apply to both intrastate and interstate telemarketing, enforce their laws against interstate telemarketers, and make a variety of meritless arguments that they have authority to regulate interstate telemarketing. Under the

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[9] For a comprehensive analysis of the jurisdictional distinction between interstate and intrastate communications, see *Operator Services Providers of America Petition for Expedited Declaratory Ruling*, 6 FCC Recd. 4475 (1991) ("OSPA"). ("The Commission has plenary and comprehensive jurisdiction over interstate and foreign communications . . . The Commission's jurisdiction is exclusive of state authority.") Id. at ¶ 10. OSPA was the primary authority cited in a January 26, 1998 opinion letter from Geraldine Matise of the FCC to Ronald Guns of the Maryland House of Delegates, which concluded: "The Communications Act, specifically Section 227 of the Act, establishes Congress' intent to provide for regulation exclusively by the Commission of the use of the interstate telephone network for unsolicited advertisements by facsimile or by telephone utilizing live solicitation, autodialers, or pre-recorded messages. . . . Maryland can regulate and restrict intrastate commercial telemarketing calls. The Communications Act, however, precludes Maryland from regulating or restricting interstate commercial telemarketing calls."

[10] *See* S. Rep. No. 102-178, 102nd Cong. at 3 ("[s]tates do not have jurisdiction over interstate calls"); 137 Cong. Rec. S. 16204 (daily ed. October 29, 1991) ("The State law does not, and cannot, regulate interstate calls") (statement of Sen. Hollings); 137 Cong. Rec. S. 18781 (daily ed. November 27, 1991) ("Pursuant to the general preemptive effect of the Communications Act of 1934, state regulation of interstate communications, including interstate communications initiated for telemarketing purposes is preempted") (Statement of Senator Hollings). *See also Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 513 (5th Cir. 1997) ("states [have] no independent regulatory power over interstate telemarketing activities"); *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1154 (1997) ("States do not have jurisdiction over interstate calls").

circumstances, it is imperative that the Commission reaffirm its exclusive jurisdiction and put an end to unauthorized state action that unfairly impacts companies engaged in interstate telemarketing.

➢ *Enacted And Proposed State Laws*

The Commission's 2003 Report and Order should have put an end to state legislative action to regulate interstate telemarketing. Unfortunately, it did not. Instead, states have almost totally ignored the Commission's directives and have continued to enact telemarketing-related laws that make no distinction between intrastate and interstate telemarketing and, consequently, purport to apply to both. A prime example is New Jersey, where the state Division of Consumer Affairs, in April 2004, issued rules ("NJ Rules") pursuant to the state DNC law ("NJ Act"). The NJ Act and NJ Rules, both of which contain provisions that are inconsistent with the federal rules, draw no distinction between intrastate and interstate telemarketing. Moreover, the NJ Rules do not contain a single reference to the Commission's 2003 Report and Order, issued only ten months earlier, which states clearly that "any state regulations of interstate telemarketing calls that differ from our rules almost certainly would conflict with and frustrate the federal scheme . . ." (2003 Report and Order, ¶ 83).

The Venetian has not found a single instance where a state has heeded the Commission's directive to avoid subjecting telemarketers to inconsistent rules (2003 Report and Order, ¶ 84) by amending its state rules to harmonize them with the federal rules. Rather, as the Joint Petition clearly demonstrates, states continue to propose all manner of telemarketing restrictions that are inconsistent with the federal rules. (Joint Petition, pp. 30-32).

➢ *Enforcement of State Laws Against Interstate Telemarketers*

The Joint Petition (pp. 23-29) discusses at length state actions to enforce their do-not-call laws against interstate telemarketers.[11] Since the filing of the Joint Petition, the Missouri Attorney General

[11] We do not believe that Figure 7 (p. 25) contains a comprehensive list of enforcement actions and proceedings, as that figure does not include threatened actions that are frequently settled without publicity or public record.

has settled actions in state court against two out-of-state companies, which resulted in fines totaling $65,000. Both companies were accused of calling consumers on the Missouri list. Similarly, in Pennsylvania, a Florida company paid a $10,200 fine to settle allegations of calling consumers on Pennsylvania's list and violating the state's disclosure rules. And in Wisconsin, the Attorney General has recently sued another Florida company, alleging calls to consumers on the state list as well as registration, disclosure, and pre-recorded message violations.[12] A common theme in the states' actions is the complaint that companies are calling consumers on state lists, lists that should by now have been absorbed into the national registry.

➢ *Arguments that States have Authority To Regulate Interstate Telemarketing*

States dispute the Commission's exclusive jurisdiction and have raised various arguments in support of their position in filings related to the other petitions in Docket No. 2-278 that have been noticed for comment. Two of these arguments require brief comment.

1. Preemption The states argue that they are not, and must not be, "preempted" from regulating interstate telemarketing. Such an argument is totally beside the point, since *federal preemption involves the displacement of state authority that would otherwise be exercisable in the absence of such preemption.* In this case, however, since states have never had authority to regulate interstate telemarketing, there is, quite simply, nothing to preempt, and the states' preemption-based arguments are inapposite.
2. Consumer Protection The states argue that a Commission declaration of exclusive jurisdiction over interstate telemarketing would prevent them from protecting their residents against unfair and deceptive acts and practices by out-of-state telemarketers. This argument fails for two reasons. First, the TCPA is not – nor was it ever intended to be – an anti-fraud statute. Rather, as shown

[12] Sources: MO, PA, WI Attorneys General web sites

previously, (pp. 2-3, supra), *the TCPA applies to legitimate telemarketing practices, involving truthful, non-misleading commercial speech.* [13]

Moreover, Congress anticipated the very argument the states have been making, and included in the TCPA specific provisions that recognize and protect the traditional consumer protection role of the states:

- States retain their broad powers to enforce in state court their consumer protection laws of general application (such as anti-fraud laws), and to do so against both in-state and out-of-state parties, including, for example, interstate telemarketers alleged to be engaged in fraudulent activities or deceptive practices. (47 U.S.C. § 227 (f)(6)).
- States are authorized to institute actions in federal court based on alleged TCPA violations affecting their residents, including violations by companies engaged in interstate telemarketing. (47 U.S.C. § 227 (f)(1)).
- States may enact, and enforce in state court, laws affecting *intrastate* telemarketing that are more restrictive than the TCPA rules. (47 U.S.C. § 227 (e)(1)).

There is simply no basis for the argument that state consumer protection efforts will be hindered by a Commission declaration of its exclusive jurisdiction over interstate telemarketing.

* * *

The foregoing actions and arguments by the states, as well as other actions they are virtually certain to take if the Joint Petition is not granted (see Part III, *infra*), make it imperative that the Commission reaffirm its exclusive jurisdiction over interstate telemarketing.

III. A Failure By the Commission to Grant The Joint Petition Would Have Serious Consequences

[13] See *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

The Venetian urges the Commission to stand fast in the face of state attempts to dilute its exclusive jurisdiction over interstate telemarketing. A failure to defend and reaffirm that jurisdiction will, The Venetian contends, have serious consequences.

- If the Commission fails to grant the Joint Petition and retains its case-by-case, narrow conflict preemption approach, it will be conceding, for all intents and purposes, that states have concurrent jurisdiction over interstate telemarketing, subject only to vague "inconsistency" limitations. Such a concession would directly contradict the basic jurisdictional structure of the Communications Act and the TCPA, as well as the many judicial and FCC decisions over seven decades that have confirmed the states' lack of authority to regulate interstate calling.
- In addition, states would remain free not only to continue enforcing their current laws against interstate telemarketers, but also to enact new anti-telemarketing measures. At particular risk will be the EBR exemption, which has already been narrowed in many states, (see pp. 4-5, *supra*), and continues to be the subject of proposed state legislation (Joint Petition, Figure 7, p.30; Figure 8, p. 32)
- States would also assert the right to regulate other aspects of interstate calling, including inbound calling, business-to-business telemarketing, and fax communication. Indeed, states will seek to regulate *foreign* calling, in direct contravention of section 2(a) of the Communications Act, by regulating calls to and from offshore contact centers. Such regulation is not in any sense theoretical; regulations have been proposed in each of these areas, and a number are currently pending (see Joint Petition, pp. 29-32). If the Commission fails to act, the states will claim authority to regulate literally every aspect of interstate calling.

CONCLUSION

Based upon the foregoing, The Venetian respectfully request the Commission to declare its exclusive jurisdiction over interstate telemarketing as requested in the Joint Petition.

Respectfully submitted,

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